Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

SADAT MUHAMMAD,

Petitioner,

v.

DIAMOND OFFSHORE COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, or not, decisions of the 16th Judicial District Court, State of Louisiana, the Third Circuit Court of Appeal, State of Louisiana, and the Louisiana Supreme Court, refusing to apply OSHA violations of 29 C.F.R. 1910.24(f) and (g) by respondent to the uninspected vessel, OCEAN LEXINGTON, are in direct conflict with this Court's controlling decision in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 122 S. Ct. 738, 151 L.Ed. 2d 659.

2. Whether, or not, the above State Courts in assessing 100% fault to the seaman respondent ignored this Court's controlling decision in *Kernan v. American Dredging Company*, 355 U.S. 394 (1958), and 45 U.S.C. §53, making the violation of an applicable regulatory statute "negligence per se" and eliminating applicant's alleged comparative fault.

PARTIES TO THE PROCEEDING

Applicant

SADAT MUHAMMAD, a person of the full age of majority and a resident of Marion County, Mississippi.

Respondent

Diamond Offshore Company, a Delaware corporation domiciled in Wilmington, Delaware, with its principal office in Houston, Texas, and its principal business establishment in New Iberia, Louisiana.

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OPINIONS BELOW

On March 28, 2001, Honorable William D. Hunter of the 16th Judicial District Court, Parish of Iberia, State of Louisiana, rendered written reasons in which he found seaman/applicant 100% at fault for his on-the-job accident. (Appendix C).

On May 16, 2001, Honorable William D. Hunter in the same Court entered Judgment dismissing applicant's claim for damages. (Appendix D).

On July 10, 2002, the Court of Appeal, Third Circuit, State of Louisiana, affirmed the Judgment of the Trial Court dismissing applicant's claim for damages. (Appendix B).

On November 27, 2002, the Supreme Court of the State of Louisiana denied applicant's writ of certiorari and/or review with two dissents from the seven Court composition. (Appendix A).

JURISDICTION

The Supreme Court, State of Louisiana, denied applicant's application for a writ of certiorari and/or review on November 27, 2002. This petition for a writ of certiorari is filed within the prescribed period of ninety (90) days after the November 27, 2002, final judgment.

The jurisdiction of this Honorable Court is invoked under the provisions of 28 U.S.C. §2106.

STATUTORY AND REGULATORY PROVISIONS

The Federal Employees Liability Act, 45 U.S.C. §53, and 46 U.S.C. §688, incorporating the rights under 45 U.S.C. §53; 46 U.S.C. §3301, statutorily defining "inspected vessels;" 43 U.S.C. §2102(43), defining "uninspected vessels;" 29 U.S.C. §654(a)(1), (2), outlining OSHA responsibility.

STATEMENT OF THE CASE

Plaintiff/applicant, Sadat Muhammad, applicant hereinafter, is a 31-year-old African American resident of Columbia, Mississippi. He is a high school graduate, married, and the father of two minor children, ages 5 and 4 at the time of the trial.

Applicant began working offshore with Pool Offshore in 1995 at age 24, and went to work with defendant/respondent, Diamond Offshore Company, respondent hereinafter, as a roustabout in October, 1996.

On March 8, 1997, applicant was a seaman/roustabout on the OCEAN LEXINGTON, an unlicenced mobile offshore drilling vessel owned by respondent, acting in the course and scope of his employment with respondent.

Applicant was injured when descending an industrial metal stair from one deck to another. The stair was in violation of 29 C.F.R. §1910.24(f), requiring uniform tread width and riser height and 29 C.F.R. §1910.24(g), requiring platforms at the top and bottom of the stair extending 30" back in the direction of travel. The stair in question had a 4½" plate across the entrance, thereby eliminating the platform and increasing the first riser from 9" to 13½".

Applicant fell down the steps as a result of these breaches of the OSHA standards and sustained disabling injuries.

On March 28, 2001, Judge William D. Hunter, His Honor below, rendered reasons for judgment in which he found applicant 100% at fault and denied applicant's Jones Act negligence and general maritime unseaworthiness claims for damages, rejecting the testimony of Dr. Gary Nelson, applicant's safety engineering expert, concerning the OSHA violations causing the accident, relying on the United States Fifth Circuit Court of Appeal decision in *Mallard Bay Drilling, Inc. v. Herman*, 212 F.3d 898 (5th Cir. 2000), reversed by this Honorable Court's decision in *Chao v. Mallard Bay Drilling, Inc.*, 532 U.S. 1017, 121 S.Ct. 1954, 149 L.Ed. 2d 751 (2002). Appendix C.

Applicant filed a timely devolutive appeal to the Third Circuit Court of Appeal from the Lower Court's denial of damages, and also cast applicant 100% at fault.

Applicant filed a motion to remand the case for further proceeding in the District Court predicated on the decision by the United States Supreme Court in *Chao v. Mallard Bay Drilling*, 534 U.S. 235, 121 S.Ct. 738, 151 L.Ed. 2d 659 (2002), reversing the Fifth Circuit decision in the same case subsequent to the Lower Court Judgment herein and prior to submission of the case for judgment in the Court of Appeal.

The Third Circuit Court of Appeal on July 10, 2002, rendered judgment affirming the Lower Court's denial of damages in favor of applicant and, in the same decision, denied applicant's motion to remand. Appendix A.

Applicant filed a timely application for a writ of certiorari, and/or review, to the Louisiana Supreme Court

and on November 27, 2002, the Court, with two dissents, denied applicant's writ application. Appendix A.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. WHETHER, OR NOT, DECISIONS OF THE 16TH JUDICIAL DISTRICT COURT, STATE OF LOUISIANA, THE THIRD CIRCUIT COURT OF APPEAL, STATE OF LOUISIANA, AND THE LOUISIANA SUPREME COURT, REFUSING TO APPLY OSHA VIOLATIONS OF 29 C.F.R. 1910.24(F) AND (G) BY RESPONDENT TO THE UNINSPECTED VESSEL, *OCEAN LEXINGTON*, ARE IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *CHAO V. MALLARD BAY DRILLING, INC.*, 534 U.S. 235, 122 S.CT. 738; 151 L.ED. 2D 659.

Honorable William D. Hunter, his Honor Below, understandingly applied the then-controlling United States Fifth Circuit Court of Appeal decision in *Mallard Bay Drilling, Inc. v. Herman*, 212 F.3d 898 (5th Cir. 2000), excluded the testimony of Dr. Gary Nelson, applicant's expert, stating in his written opinion, Appendix C:

> "Although Dr. Gary Nelson, a safety engineer, testified by deposition as to the safety of the stairwell and spoke of OSHA regulations, the OCEAN LEXINGTON is not under any OSHA guidelines. *Watterson v. Mallard Bay Drilling*, 649 So.2d 431 (La. App. Cir. 3, 10-12-94)."

We believe that His Honor was referring to *Mallard v. Herman*, a federal appeals decision, and not to *Watterson v. Mallard*, a state appeals decision, since *Mallard v.*

Herman eliminated the applicability of OSHA regulations to the drilling rig therein. *Watterson v. Mallard* held OSHA regulations to apply to the drilling rig therein and the violation thereof to be "negligence *per se*" under *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed. 2d 382 (1958). It also eliminated contributory negligence of the seaman as a consideration under 45 U.S.C. §53.

We would accept the applicability of *Watterson v. Mallard* because it would mean that applicant should have recovered at trial. However, *Herman v. Mallard*, coming after *Watterson v. Mallard,* eliminated the applicability of OSHA regulations to a drilling rig because it is a vessel and, according to that decision, only subject to Coast Guard regulations.

However, the United States Supreme Court in *Chao v. Mallard Bay Drilling* (the same case as *Herman*, involving a change in United States Secretaries of Labor from Herman to Chao), 532 U.S. 1017, 121 S.Ct. 1954, 149 L.Ed. 2d 751 (2002), specifically reversed *Herman v. Mallard,* supra, and held OSHA regulations applicable to drilling rigs, subsequent to the District Court decision herein but before the Appellate Court decision herein. *Chao v. Mallard,* supra, is on all fours with *Watterson v. Mallard*, supra. The *Chao* decision, of course, is binding on the Louisiana Courts (District, Appeal, and Supreme), under the Supremacy Clause of the United States Constitution, Article 6, Clause 2, and Louisiana Supreme Court decisions in *Dedon v. Dedon*, 404 So.2d 904 (La. 1981); and *Vendetto v. Soniat Offshore Drilling Co.*, 725 So.2d 474 (La. 1999) (applying the maritime law of the United States Fifth Circuit).

An Appellate Court is bound to adjudge a case before it in accordance with the law existing at the time of its decision. When the law changes during the pendency of a suit, the new law applies on appeal even though it requires reversal of a Trial Court judgment which was correct under the law at the time it was rendered. *Jacobs v. City of Bunkie*, 737 So.2d 14 (La. 1999).

The Third Circuit Court of Appeal, unable to distinguish the United States Supreme Court holding in *Chao v. Mallard Bay*, supra, and sidestepping applicant's motion to remand predicated thereon, makes the astounding, and unsupported, conclusion that the OCEAN LEXINGTON is an "inspected" vessel. Appendix B.

"Inspected vessel" is not a term subject to interpretation. "Inspected vessels", subject to exclusive Coast Guard regulation, are 14 types statutorily defined by the United States Congress with specificity in 46 U.S.C. §3301, and a mobile offshore drilling rig, like the OCEAN LEXINGTON, is not one of the 14 described vessels designated as "inspected".

The term "inspected vessel" as used in 46 U.S.C. §3301, because of its exclusivity, has been given a strict interpretation. Steam vessels, one of the 14 listed inspected vessels, for instance, does not include motorboats. *Vryant v. Rucker*, 11 F.Supp. 309 (D.C. Ala. 1953). Also tugboats that are motor-driven, as opposed to steam powered, are not "inspected vessels". *Kelly v. Washington*, 302 U.S. 1, 82 L.Ed. 3, 58 S.Ct. 87 (1937).

It is undisputed that OSHA regulations have no applicability to the 14 specific vessels described as "inspected vessels" under 46 U.S.C. §3301.

The mobile offshore drilling rig, OCEAN LEXINGTON, is clearly not an "inspected" vessel as a matter of law and the Court of Appeals characterization of it, as such, in its opinion, is clearly erroneous as a matter of law. Only the United States Congress, and not the State Appellate Court, can determine what is, and what is not, an "inspected vessel" as a matter of law.

The question then posed is whether this legally "uninspected" vessel is subject to OSHA regulation and that is resoundingly answered by this Honorable Court in *Chao v. Mallard*, supra, as follows:

> "In Coast Guard terminology, Rig 52 was an 'uninspected vessel' under 43 U.S.C. §2101(43) as opposed to one of the 14 varieties of inspected vessels subject to comprehensive Coast Guard regulation. See 46 U.S.C. §3301 (1994 ed. and Supp. V)."

The Court in *Chao*, supra, went on to state:

> " . . . mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction. Furthermore, another federal agency's minimal exercise of some authority over certain conditions on vessels such as Rig 52 does not result in complete pre-emption of OSHA jurisdiction, because the statute also makes clear that OSHA is only pre-empted if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated, and if such regulations 'affect occupational safety or health.' §653(b)(1). n7 **To determine whether Coast Guard regulations have pre-empted OSHA's jurisdiction over the working conditions on Rig 52, it is thus**

> **necessary to examine the contours of the Guard's exercise of its statutory authority, not merely the existence of such authority."** (Bold emphasis added).

No factual determination was made by the Louisiana Trial Court, the Appellate Court, or the Supreme Court of "the contours of the Guard's exercise of its authority", or OSHA's obligation to require the employer to provide working conditions that "are free from recognized hazards which are likely to cause death or serious bodily harm" to their employees, and to require employer compliance with safety standards promulgated by the Secretary of Labor. 29 U.S.C. §654(a)(1), (2).

29 C.F.R. 1910.24(f) and (g), the OSHA regulation specifically applicable to fixed industrial stairs, like those involved herein, provides:

> "(f) Stair treads. All treads shall be reasonably slip-resistant and the **nosings shall be of non-slip finish**. Welded bar grating treads without nosings are acceptable providing the leading edge can be readily identified by personnel descending the stairway and provided the tread is serrated or is of definite nonslip design. **Rise height and tread width shall be uniform throughout any flight of stairs including any foundation."** (Bold emphasis added).
>
> "(g) Stairway platforms. Stairway platforms shall be **no less than the width of a stairway and a minimum of 30 inches in length measured in the direction of travel."** (Bold emphasis added).

The 4½ inch plate across the top of the stair eliminated the required platform and also created a grossly disproportionate top riser.

Dr. Gary Nelson, one of applicant's experts, testified that the stairs involved in applicant's accident were in direct violation of the OSHA regulation in that there was an absence of uniformity in the treads and risers and in the requirement of a platform at the top and bottom no less than the width of the stairwell and a minimum of 30 inches in length.

In his deposition, introduced into evidence at pp. 637-639, he opined:

> "Q. Now, in looking at the staircase in question, that is, the four photographs 9 through 12, would you tell us what, if any, deficiencies that you find as a safety engineer in the design and construction of the stairwell?
>
> A. Yes, there are two primary deficiencies. First, is the introduction of a very specific and serious hazard in the form of a tripping hazard at the very top of the stairs, which produces stair dimensions that are not uniform. It violates all design standards in terms of uniform tread-riser dimensions, and it also violates the sections of the standards dealing with landings, which indicate that the landing must extend forward from the top of the stairs at least the width of the stairs and a minimum, I think of 36 inches, if I'm correct.
>
> So there is not a flat landing at the top of the stairs. You have this plate barrier at

> the very top of the stairs that you have to step over.
>
> Also violative of good design would be that the handrails are essentially unaccessible until you get on the first step descending. Of course, that's the very time you need the handrails because you are stepping over this physical hazard."

Dr. Nelson also testified that the statutory defects in the steps were the proximate cause of applicant's accident.

Dr. Nelson was uniquely qualified to render an expert opinion in this case. He obtained a Ph.D. in industrial safety engineering from Texas A&M University in 1975. His Master's Thesis was entitled **"Engineering–Human Factors Interface in Stairway Tread–Riser Design,"** one of the specific issues in this case. Dr. Nelson taught industrial safety engineering at Texas A&M for 12 years and worked in the field of safety engineering for 36 years. In short, it is respectfully submitted that Dr. Nelson's expertise in safety engineering, predicated on his education, work experience, and teaching experience is self-evident and requires no further substantiation. Applicant, however, refers this Honorable Court to the case of *Marceaux v. Conoco, Inc.*, 124 F.3d 730 (5th Cir. 1997), in which Dr. Nelson was accepted as an expert in the field of safety engineering by the United States Fifth Circuit Court of Appeal.

Retired Commander David Cole, another applicant expert, with years of active service as a marine inspector, accident investigator, and reconstructionist, testified that the 4½ inch plate across the top of the stairs eliminating

the OSHA required platform, was a cause in fact of applicant's accident.

Judge William D. Hunter in the State District Court ignored this testimony under the then controlling decision of the Fifth Circuit in *Mallard Bay Drilling v. Herman,* supra,

The violation of OSHA Regulation 29 C.F.R. 1910.24(f) and (g) by respondent in failing to have uniform treads and risers and a platform as wide as the stairs and a minimum of 30" back from the stairs, constitute negligence *per se* under *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed. 2d 382 (1958).

Applicant, in view of the foregoing law and expert testimony, certainly cannot be held to have overcome negligence *per se* under *Kernan v. American Dredging Co.*, supra, and the burden under *The Pennsylvania*, 88 U.S. 125 (1874).

It is obvious that the trial of this matter was **fatally flawed** by the state of the law at the time and the dramatic change in the law thereafter. It is only fair, and just, that this matter be remanded to the Louisiana Supreme Court with a mandate that they order a new trial so that the critical evidence now admissible can be considered by Honorable William D. Hunter.

As a matter of fact Mr. Cass, the defense "expert" relied on by the Court of Appeal to incorrectly classify the OCEAN LEXINGTON to be an "inspected vessel", testified that the United States Coast Guard did not have any specifications for exterior stairs. Therefore, the Coast Guard and no other federal agency, pre-empted OSHA's

obligation to impose safety regulations and a duty on the employer herein.

Seamen are historically "wards" of the Courts. See *Colmar S.S. Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651, 82 L.Ed. 993 (1938). They deserve, and are afforded, special treatment because of the hazardous nature of their employment and also because they have no compensation scheme to fall back on. Therefore, these special laws and statutes were enacted in recognition of their "ward" status. To ignore the statutory benefits reduces them from "ward" status to a status below that of land-based employees.

II. WHETHER, OR NOT, THE ABOVE STATE COURTS IN ASSESSING 100% FAULT TO THE SEAMAN RESPONDENT IGNORED THIS COURT'S CONTROLLING DECISION IN *KERNAN V. AMERICAN DREDGING COMPANY*, 355 U.S. 394 (1958), AND 45 U.S.C. §53, MAKING THE VIOLATION OF AN APPLICABLE REGULATORY STATUTE "NEGLIGENCE PER SE" AND ELIMINATING APPLICANT'S ALLEGED COMPARATIVE FAULT.

The Louisiana Lower Court, the Appellate Court, and the Supreme Court found applicant 100% responsible for applicant's fall down a flight of statutorily defective stairs.

A Jones Act seaman, like applicant herein, cannot be guilty of contributory negligence when the owner of the vessel, respondent herein, violates a statute, or regulation, enacted for the safety of his seaman employees.

We have shown in argument I that respondent violated the OSHA regulation, 29 C.F.R. 1910.24(f) and (g), in failing to provide uniform risers and treads and in failing

to provide a platform at the top of the steps at least as wide as the steps and 30 inches back. Obviously, the OSHA regulation was enacted to prevent the very type of accident that occurred to applicant herein.

45 U.S.C. §53 of the Federal Employees' Liability Act is incorporated into the Jones Act, and applies with equal force to seamen such as applicant. See *Kernan v. American Dredging Co.*, 355 U.S. 426, 2 L.Ed. 2d 382, 78 S.Ct. 394 (1958).

45 U.S.C. §53 of the FELA provides:

> "In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act [45 USCS §§ 51 et seq.] to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: **Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.**" (Bold emphasis added).

Obviously, the OSHA regulations afore cited were enacted specifically for the safety of users of stairways. However under *Kernan v. American Dredging Company*, supra, it is irrelevant whether, or not, the particular provision was enacted for the safety of the crew members just so long as the instrument in statutory violation was a

cause of the crew member's injury. For instance, in *Kernan v. American Dredging Company*, supra, a navigational light in violation of a navigational regulation, having nothing to do with crew member's safety, was found to be a cause of the crew member's injury creating liability and abrogating any contributory negligence factor.

Under the FELA, incorporated into the Jones Act, the breach of a safety statute which is even a "slight contributing cause" makes the employer responsible for 100% of the seaman's injury, without consideration of, or reduction for, the seaman's contributory negligence, if any. See *In Re: Complaint of Roy Cook & Sons, Inc. v. Allen*, 778 F.2d 1037 (5th Cir. 1986).

His Honor in the District Court understandably ignored the OSHA regulation because of the state of the law at trial but, in so doing, he also utilized the wrong burden of proof. He utilized a reasonable employer/reasonable seaman standard citing *Gautreaux v. Scurlock*, 107 F.3d 331 (5th Cir. 1997) and *Vendetto v. Soniat Offshore Drilling Co.*, 725 So.2d 474 (La. 1999), instead of the statutory violation standard making the employer 100% responsible when the violation is a "slight contributing cause" and exonerating the employee from any contributing negligence under *Complaint of Roy Cook & Sons, Inc. v. Allen*, supra.

It is respectfully submitted that the Louisiana Courts erred in finding applicant guilty of contributory negligence under the cited law and that they all precipitated a gross injustice in finding the applicant seaman 100% at fault when the law requires the employer to be judicially cast

for 100% of the fault when a statutory violation is found to have been committed.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant a writ of certiorari to the Louisiana Supreme Court, State of Louisiana, and after due proceedings, remand this matter to the Supreme Court of Louisiana with a mandate to order the 16th Judicial District Court, Parish of Iberia, State of Louisiana, to retry this case in view of this Honorable Court's decision in *Chao v. Mallard Bay Drilling, Inc.*, supra, materially changing the law applicable to the case.

Respectfully Submitted,

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APPENDIX

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Decision dated July 10, 2002, from the Court of Appeal, Third Circuit, State of Louisiana;.....App. 2

APPENDIX C
Written Reasons signed March 28, 2001, by the Honorable William D. Hunter of the 16th Judicial District Court, Parish of Iberia, State of Louisiana;..App. 20

APPENDIX D
Judgment dated May 16, 2001, rendered by the Honorable William D. Hunter of the 16th Judicial District Court, Parish of Iberia, State of Louisiana;..App. 33

APPENDIX A

The Supreme Court of the State of Louisiana

SADAT MUHAMMAD

VS.

NO. 2002-C-2409

DIAMOND OFFSHORE COMPANY

IN RE: Muhammad, Sadat; – Plaintiff; Applying for Writ of Certiorari and/or Review, Parish of Iberia, 16th Judicial District Court Div. D, Nos. 86-273; to the Court of Appeal, Third Circuit, No. 02-0172

November 27, 2002

Denied.

CDT
CDK
JPV
JTK
JLW

CALOGERO, C.J., would grant the writ.

JOHNSON, J., would grant the writ.

Supreme Court of Louisiana
November 27, 2002

/s/ Rai L. Dayli
Deputy Clerk of Court
For the Court

APPENDIX B

STATE OF LOUISIANA

COURT OF APPEAL, THIRD CIRCUIT

02-0172

SADAT MUHAMMAD

VERSUS

DIAMOND OFFSHORE COMPANY

Judgment rendered ***July 10, 2002***. Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 or La. Code Crim. P. art. 922.

* * *

APPEAL FROM THE
SIXTEENTH JUDICIAL DISTRICT
PARISH OF IBERIA, NUMBER 86,273
HONORABLE WILLIAM D. HUNTER

* * *

GLENN B. GREMILLION
JUDGE

* * *

Court composed of Sylvia R. Cooks, Jimmie C. Peters, and Glenn B. Gremillion, Judges.

AFFIRMED IN PART AND REVERSED IN PART

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GREMILLION, Judge.

The plaintiff, Sadat Muhammad, appeals the trial court's judgment finding that he failed to prove negligence on the part of the defendant, Diamond Offshore Company, and the denial of his claim of unseaworthiness. Diamond answered the appeal seeking reversal of portions of the trial court's judgment. We affirm in part and reverse in part.

FACTS

On March 8, 1997, Muhammad sustained injuries as a result of a fall while traversing the stairs leading from the port pipe rack deck to the air conditioner deck on the Rig OCEAN LEXINGTON. Muhammad, a roustabout for

Diamond, was carrying a five-gallon bucket of industrial soap in one hand and a long-handled brush in the other as he approached the stairs. He fell down the stairs as he was attempting to step over a four and one-half inch coaming located at the top of the stairs. Shortly thereafter, Muhammad filed suit against Diamond seeking damages pursuant to the Jones Act, 46 U.S.C.App. § 688, and the general maritime law claim of unseaworthiness. A petition of intervention was filed by Muhammad's former attorneys, Lambert & Nelson, P.L.C., seeking attorney's fees as a result of a contingency fee contract entered into between them and Muhammad. This matter was severed from the trial of the main demand.

Following a bench trial on the merits, the trial court held that Muhammad was solely at fault in causing the accident and that Diamond did not breach any duty owed to him. It further held that he failed to prove that an unseaworthy condition of the OCEAN LEXINGTON was a proximate cause of his accident and subsequent injuries. The trial court also held that Diamond improperly withheld maintenance and cure payments from Muhammad and that he had not yet reached maximum medical recovery due to the fact that further surgery was scheduled on his lumbar spine. It awarded Muhammad maintenance of $15 per day from November 8, 1997 until he reached maximum medical recovery, past medical expenses of $59,599.53, and future medical expenses of $46,309. Based on a joint motion of the parties, Muhammad's daily rate of maintenance was amended from $15 to $20 per day.

A judgment was rendered on May 14, 2001, which awarded Muhammad the above stated damages, and also awarded him pre-judgment judicial interest on his past and future medical expense awards from March 8, 1997,

and judicial interest on his maintenance award from November 8, 1997, until he reached maximum medical recovery. This appeal by Muhammad followed. Subsequent to his motion for appeal, an order was issued staying execution of the May 14, 2001 judgment pending this appeal. A hearing on the award of attorney's fees was held, after which the trial court awarded Muhammad attorney's fees in the amount of $15,000.

ISSUES

Muhammad raises six assignments of error on appeal. He argues that the trial court erred in excluding evidence of Diamond's violation of applicable Occupational Safety and Health Act (OSHA) regulations and in relying on *Vendetto v. Sonat Offshore Drilling Co.,* 97-3103 (La. 1/20/99), 725 So.2d 474, and *Gautreaux v. Scurlock Marine, Inc.,* 107 F.3d 331 (5th Cir. 1997), in finding Diamond free from fault. He further argues that the trial court erred in failing to find the OCEAN LEXINGTON unseaworthy, in failing to apply the doctrine of momentary forgetfulness, and in failing to award him general and economic damages as a result of his cervical discectomy and his lumbar fusion.

Diamond answered Muhammad's appeal, arguing that it was aggrieved by the trial court's award of future medical expenses and pre-judgment interest on those expenses, and by the trial court's award of attorney's fees to him based on a finding that it wrongfully terminated his maintenance and cure benefits.

MOTION TO REMAND

Initially, we note that Muhammad has filed a Motion to Remand asking that we remand this matter to the trial court for further proceedings in light of *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 122 S.Ct. 738 (2002). *Chao* dealt with the applicability of OSHA regulations to a vessel which had not been inspected by the Coast Guard and in which it had not issued affirmative regulations covering the working conditions at issue. However, we need not remand this matter, since the trial court never reached the issue of whether the coaming at issue was defective. Rather, the trial court held that Muhammad failed to carry his burden of proving that the coaming was the proximate cause of his accident. Since the issue of whether the coaming was defective was never reached, a remand of this matter is not called for. Additionally, the report of Diamond's expert in naval architecture and marine surveying, Sheldon Cass, states that the OCEAN LEXINGTON requires yearly inspections in order to maintain a current U.S. Coast Guard certificate. Thus, this is a vessel which has been inspected by the Coast Guard. Accordingly, the motion to remand is denied.

JONES ACT

Jones Act negligence was discussed by the supreme court in *Foster v. Destin Trading Corp.*, 96-0803, pp. 3-4 (La. 5/30/97), 700 So.2d 199, 208 (on rehearing):

> The Jones Act allows an injured seaman to bring a negligence suit against his employer. 46 U.S.C.App. § 688 (1994). The employer's potential liability extends to all personal injuries arising during the course of the seaman's employment, but proof of negligence is essential

> to recovery. *See id.* Such negligence may arise in many ways including the failure to use reasonable care to provide a seaman with a safe place to work, the existence of a dangerous condition on or about the vessel, or any other breach of the duty of care. *See Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 329 (5th Cir.1977); 1 Thomas J. Schoenbaum, Admiralty and Maritime Law § 6-21, at 312 (2d ed.1994). The duty of care owed by an employer under the Jones Act is that of ordinary prudence, namely the duty to take reasonable care under the circumstances. *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 335-36 (5th Cir.1997). The seaman bears the evidentiary burden of proving that a breach of the duty owed by the employer was a cause of his injuries. However, a seaman need only present "slight evidence" that his employer's negligence caused his injuries in order to reach the jury or to be sustained upon appellate review. *Id.* at 334-35. The employer can introduce evidence of the seaman's own negligence to reduce damages through application of pure comparative fault principles. Like his employer, the seaman must meet the standard of ordinary prudence by acting as a reasonable seaman would act under the same circumstances. *Id.* at 339.

The manifest error – clearly wrong standard of review applies in Jones Act and general maritime cases. *Ates v. Mallard Bay Drilling Inc.*, 01-836 (La. App. 3 Cir. 12/12/01), 801 So.2d 653, *writ denied,* 02-0100 (La. 3/15/02), 811 So.2d 915.

After reviewing the record in its entirety, we find that the trial court was presented with differing views of the evidence pertaining to the cause of Muhammad's fall. Thus, it was reasonable for the trial court to find that

Muhammad failed to act as a reasonable seaman would under like circumstances and that he was the sole cause of the accident.

Muhammad testified that he was carrying a five gallon-plastic bucket of industrial soap in one hand and a four-foot-long brush in the other hand when he attempted to descend the stairway. He was unsure which hand held which item. He stated that he intended to step over the coaming and then grasp the stair railing with the hand holding the brush. Before he could do so, Muhammad testified that he fell as he brought his trailing foot over the coaming. However, in his deposition, he was unsure of the specific cause of his fall, stating that the brush he was carrying became caught in the coaming. After his fall, the bristle part of the brush was found caught in the coaming at the top of the stairs, while the handle was found at the bottom of the stairs with him. Muhammad testified that he had been up and down these stairs before and that he was aware of Diamond's policy requiring him to always hold onto a railing with one hand while ascending or descending stairways. However, he denied being told that he could not traverse the stairs while carrying something in both hands.

Diamond presented evidence pertaining to its policy requiring employees to hold onto railings with one hand any time they were using stairways on the OCEAN LEXINGTON. Its safety manual specifically states, "Traveling up and down ladders or stairways require the employee to use the handrails." Diamond employees, Oliver Gandy and Timothy Taylor, both testified that its policy requires an employee to maintain one hand on the handrail at all times while traversing stairways on the rig. They further stated that Diamond's policy required an employee

carrying a brush and bucket to place the brush in the bucket before using a stairway. Jerry McHenry, Diamond's safety representative on the rig at the time of the accident, verified its policy required employees to keep one hand on a handrail at all times.

Gandy testified that Muhammad admitted not having a hand on the handrail at the time of his fall and that he had attended a safety meeting minutes earlier, at which this policy was discussed. Gandy further stated that he has never had a problem with the stairs and that he first grasps hold of the handrail before stepping over the coaming and proceeding down the stairs. Taylor, who was on the air conditioner deck, testified that he saw Muhammad approaching the stairs with the bucket and brush in his hands and then saw him falling, but that he did not see what caused him to fall. Both stated that the bucket and brush handle were found on the air conditioner deck with Muhammad, but the brush itself was found at the top of the stairs behind the coaming. McHenry recalled that Muhammad stated that he was not using the handrail at the time of the accident.

Considering the foregoing evidence, we cannot say that the trial court was manifestly erroneous in finding that Muhammad was the sole cause of his accident. Accordingly, the judgment of the trial court denying his claim for damages pursuant to the Jones Act is affirmed. This assignment of error is dismissed as being without merit.

UNSEAWORTHINESS

Pursuant to the general maritime law, a seaman is entitled to work on a seaworthy vessel. Thus, a vessel

owner has an absolute duty to furnish a seaworthy vessel, and a breach of that duty will give rise to a claim for general damages. *Vendetto v. Sonat Offshore Drilling Co.*, 97-3103 (La. 1/20/00), 725 So.2d 474. An action for unseaworthiness arises if a seaman alleges that he was injured as a result of a defective condition of the vessel, its equipment, or its appurtenances. *Id.* The unseaworthiness of a vessel is a question of fact, which will be determined on a case-by-case basis. *Id.*

> There is a more stringent causation requirement for claims of unseaworthiness than Jones Act claims. In an unseaworthiness claim, the plaintiff must show that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness. *Phillips [v. Western Company of North America],* 953 F.2d [923,] at 928 [(5th Cir. 1992)].

Derouen v. Mallard Bay Drilling, LLC, 00-1268, p. 7 (La.App. 3 Cir. 6/22/01), 808 So.2d 694, 705.

The trial court denied Muhammad's claim of unseaworthiness, finding that he failed to meet the threshold evidentiary standard for proving such a claim. It held that the cause of Muhammad's accident was likely something other than the placement of the coaming.

After reviewing the evidence, we find that the trial court was presented with contradictory evidence on this issue. Therefore, we cannot say that it erred in denying Muhammad damages based on his general maritime law claim of unseaworthiness.

David Cole, an expert in admiralty and maritime matters, testified that the coaming represented a tripping hazard because it did not allow a person descending the steps to progress down them as they would any other stairs. He opined that the coaming presented a vertical barrier requiring Muhammad to lift his foot up and over the four inch barrier and then step down a distance greater than the expected twelve inches in order to reach the first tread of the stairway. Although he admitted that coamings are used as pollution control devices on board vessels, Cole recommended that it be moved closer to the source of the possible oil spill, so that a person traversing it would not have to do so while also attempting to descend a stairway. Based on his understanding of what had occurred, Cole testified that the coaming was the cause of Muhammad's fall.

Cole further testified that the stairway's handrails presented a deficiency in their design since there was a gap between them and the pipe rack deck's guardrail. He stated that the handrails should have been constructed so that they joined the top railing of the guardrail, which would allow a continuous railing for a person at the transition point between the deck and the stairway. As constructed, he stated that the stairway presented nothing for the person descending the stairway to grab a hold of while he was taking the exaggerated step up and over the coaming in order to access the stairway. However, Cole testified that there were no regulations specifying the construction of handrails or pertaining to the placement of coamings. He further testified that Muhammad had an obligation to recognize and safely negotiate the hazard and that a seaman has an obligation to hold onto a railing whenever possible. Cole stated that he would not condone

Muhammad traversing the coaming and the stairway while holding a bucket in one hand and a brush in the other.

Cass testified that neither the coaming nor the stairway itself presented an unreasonable risk of harm to the men working on the rig. After physically inspecting the stairway in question, he stated that this stairway met the Coast Guard requirements for interior stairways, since its slope did not exceed fifty degrees. Cass testified that there are no specific regulations pertaining to exterior stairways. He further stated that the coaming did not present an unreasonable risk since it was well painted and striped and was easily observable as a hazard.

After reviewing the evidence, we find no error in the trial court's denial of this claim. The cause of Muhammad's fall was his failure to hold onto one of the stairway handrails during an attempt to traverse the stairs while carrying a bucket of industrial soap in one hand and a long-handled brush in the other hand. Accordingly, we find that he failed to carry his burden of proving that the unseaworthy condition of the OCEAN LEXINGTON, namely the position of the coaming or the location of the handrails, played a substantial part in bringing about his fall. The judgment of the trial court denying Muhammad's claim of unseaworthiness is affirmed. This assignment of error is dismissed.

MOMENTARY FORGETFULNESS

In his fifth assignment of error, Muhammad argues that the trial court erred in failing to apply the doctrine of "momentary forgetfulness" to the facts of this case. We disagree. We have held that this doctrine should apply

only in those instances where there is "evidence of circumstances reasonably sufficient to have diverted plaintiff's mind from the danger in question. Mere forgetfulness or lapse of memory is not excusable absent adequate diverting circumstances." *Hailey v. LaSalle Parish Police Jury,* 302 So.2d 668, 671 (La.App. 3 Cir. 1974). Although Muhammad testified that the employees were instructed to clean the rig because Diamond personnel were arriving for a visit, we do not find that this was the type of diverting circumstance meant by *Hailey,* such that it would absolve him of his comparative negligence. Muhammad stated that the cleanup they were involved in was routine cleanup. He further stated that he normally carried items in both hands while traversing stairs on the OCEAN LEXINGTON. Accordingly, we find no merit in this assignment of error.

DAMAGES

Based on our finding affirming the trial court's judgment denying Muhammad's claims for damages pursuant to the Jones Act and general maritime law, this assignment of error is rendered moot.

FUTURE CURE

In its answer to appeal, Diamond argues that the trial court erred in awarding Muhammad future cure since he presented "no evidence of an immediate need for future medical treatment within a definite time frame." Following the rendition of judgment, Diamond filed a Motion and Order to Show Cause Why Future Cure Should Not Be Reimbursed with Incorporated Memorandum in Support. Diamond argued that it had paid Muhammad the sum

awarded by the trial court for the lumbar surgery recommended by Dr. Adatto; however, it claimed that surgery was put off until such time as Muhammad loses weight. Thus, it argued that it was entitled to reimbursement of the $46,309 it paid for the future surgery and the termination of its maintenance obligation. Pursuant to a January 8, 2001 consent judgment, Diamond was relieved from paying Muhammad maintenance and cure from December 20, 2001, until such time as he undergoes the recommended surgery.

The law with regard to maintenance and cure was discussed in *Domonter v. C.F. Bean Corp.*, 99-1204, pp. 17-19 (La.App. 5 Cir. 4/25/00), 761 So.2d 629, 640, *writ denied,* 00-1872 (La. 9/29/00), 770 So.2d 354:

> "Maintenance and cure" is an ancient duty imposed upon the owner of a ship to provide food, lodging and necessary medical services to seamen who become ill or injured during service to the ship. *Burgess v. C.F. Bean Corp,* 98-3072 (La.App. 4th Cir.8/18/99), 743 So.2d 251; *Comeaux v. Basin Marine, Inc.,* 93-1624 (La.App. 1st Cir.6/24/94), 640 So.2d 833, 836, *writ denied,* 94-2307 (La.11/18/94), 646 So.2d 386; *Davis v. Odeco, Inc.,* 18 F.3d 1237, 1245 (5th Cir.1994), *cert. denied,* 513 U.S. 819, 115 S.Ct. 78, 130 L.Ed.2d 32 (1994). Recovery is not dependent upon negligence of the vessel or the owner and the burden of proof in seeking maintenance and cure is relatively light. *Id.* In addition, generally, a seaman need only prove that the injury arose during his service of the vessel. The seaman does not have to prove a causal connection to his duties. *Liner v. J.B. Talley and Company, Inc.,* 618 F.2d 327, 332 (5th Cir.1980); *Burgess v. C.F. Bean Corp,* supra; *Comeaux v. Basin Marine, Inc.,* 640

> So.2d at 836. The right to maintenance and cure exists regardless of fault. The remedy is essentially curative in nature and is not intended as compensation for injury. *Boudreau v. S/V SHERE KHAN C, in rem,* 27 F.Supp.2d 72, 83 (D.Maine 1998). The right to maintenance and cure arises from the employee-employer relationship. *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 731, 63 S.Ct. 930, 934, 87 L.Ed. 1107 (1943)[.] Thus, the liability of shipowner for maintenance and cure will be excused only by willful misbehavior or deliberate act of indiscretion on part of seaman. *Aguilar v. Standard Oil Co.,* 318 U.S. at 731, 63 S.Ct. at 934; *DiBenedetto v. Williams,* 880 F.Supp. 80, 86 (D. Rhode Island 1995).
>
> Cure is payment of the seaman's medical, therapeutic and hospital expenses, until that point in time when plaintiff reaches maximum medical recovery. *Fox v. Texaco, Inc.,* 97 2126 (La.App. 1st Cir.11/6/98), 722 So.2d 1064, 1067. Because it [sic] not fault based, but arises from the contractual relationship between the parties, defendant cannot avail itself of the apportionment of fault to reduce its liability for plaintiff's medical expenses. The award of medical expenses can be construed as compensation related to personal injury only when the defendant's actions in failing to pay maintenance and cure results in the worsening of a plaintiff's condition. *Karim v. Finch Shipping Co., Ltd.,* 97-2518 (La.App. 4th Cir.8/26/98), 718 So.2d 572, 580.

Additionally, a seaman may only recover maintenance and cure for those expenses actually incurred. *Davis v. Odeco, Inc.,* 18 F.3d 1237 (5th Cir. 1994), *cert. denied sub nom,* 513 U.S. 819, 115 S.Ct. 78 (1994). In *Calmar S.S. Corp. v. Taylor,* 303 U.S. 525, 532-33, 58 S.Ct. 651, 55 (1938), the

Supreme Court held with regard to the award of future maintenance and cure:

> The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the court, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained.

In this instance, we agree with Diamond that the award of future cure should be reversed since it cannot be definitely ascertained when Muhammad will lose enough weight in order to undergo lumbar surgery. Muhammad has been attempting to lose weight since early 1997, when he began treatment with Dr. Watermeier. Since he has not been able to lose the required weight during this length of time, there is no way of knowing when, or if ever, he will successfully accomplish this task. However, our decision will not preclude Muhammad from bringing suit in the future, should he lose the weight and decide to have the surgery. Accordingly, the judgment of the trial court awarding Muhammad $46,309 in future cure is reversed.

ATTORNEY'S FEES

Diamond further argues that the trial court erred in awarding Muhammad $15,000 in attorney's fees based on its egregious conduct in wrongfully terminating his maintenance and cure benefits.

After reviewing the evidence, we find error in the trial court's award of attorney's fees based on its finding that Diamond improperly withheld maintenance and cure

benefits from Muhammad subsequent to November 8, 1997. An award of attorney's fees is proper only if the employer has been found to have acted in a fashion which is "callous and recalcitrant, arbitrary and capricious, or willful, callous, and persistent." *Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir. 1987) (footnote omitted). That court went on to further state:

> Thus, there is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.

Id.

A review of the record reveals no instance in which Diamond acted in a willful, callous, or persistent manner. Rather, we find this was an instance in which there were differing opinions between the medical experts as to Muhammad's condition.

Diamond terminated Muhammad's maintenance and cure benefits on November 8, 1997, based on the opinion of Dr. Christopher Cenac, an orthopedic surgeon, who examined Muhammad on four different occasions, the last taking place on October 29, 1997. At his initial visit, on March 20, 1997, Muhammad did not tell either Dr. Cenac or his nurse that he was suffering from any neck complaints. He did not complain of neck pain until his October

29th visit, at which time, he stated that his neck began bothering him in August 1997. At that time, Dr. Cenac released Muhammad to full unrestricted duty finding that he was at maximum medical improvement and that he did not require any further invasive testing or treatment. After reviewing a pre-employment MRI performed on Muhammad in October 1996, and a post injury MRI of March 1997, Dr. Cenac opined that the findings on both tests were identical. He further found some slight degenerative changes in the lumbar spine in the October 2, 2000 MRI, which he attributed to aging. Dr. Cenac opined that there was no relationship between Muhammad's present problems, including his cervical findings, and the March 8, 1997 accident.

Diamond also had the opinion of Dr. Michael Molleston, a neurosurgeon, who was chosen by both Diamond's and Muhammad's original attorney's. [sic] After his April 1, 1997 examination, Dr. Molleston found nothing wrong neurologically with Muhammad. He admitted having headaches, but denied any neck pain when he was directly questioned about this by Dr. Molleston. Dr. Molleston found him uncooperative in his examination, very sensitive to trivial touching, and forcibly resistant to the straight leg raise test. He felt that this indicted symptom magnification. Although Muhammad complained of headaches on the top of his head, Dr. Molleston stated that headaches in this area were atypical for indicating the presence of a neck injury. Although he recommended Muhammad undergo further diagnostic testing, such as a bone scan, these tests were never performed.

Diamond further introduced the report of Dr. Thompson Dietz, a radiologist, who reviewed the MRIs performed on Muhammad in October 1996, March 1997, and May

2000. After reviewing these three tests, Dr. Dietz found that the later MRI was comparable to the both [sic] earlier MRIs, in that there was only a relatively subtle interval increase in the size of the previously noted L5 S1 disc herniation, which dated back to October 1996.

Finally, Diamond introduced evidence that Muhammad was involved in two automobile accidents in January 1998. In the second accident, which occurred on January 30, 1998, Muhammad stated that he struck his head into the ceiling of the car, where it joins the windshield. Both Drs. Adatto and Watermeier stated that this type of injury could cause or aggravate a previous neck injury.

Considering the evidence, we find that Diamond did have a reasonable defense for terminating Muhammad's maintenance and cure, and that it did not exhibit a callousness or indifference to his plight which would subject it to attorney's fees. Accordingly, the judgment of the trial court awarding Muhammad $15,000 in attorney's fees is reversed.

CONCLUSION

For the foregoing reasons, the judgment of the trial court awarding Sadat Muhammad future cure is reversed, as is the award of attorney's fees. The remainder of the trial court's judgment is affirmed. The costs of this appeal are assessed equally between the plaintiff-appellant, Sadat Muhammad, and the defendant-appellee, Diamond Offshore Company.

AFFIRMED IN PART AND REVERSED IN PART.

APPENDIX C

SADAT MUHAMMAD	**16TH JUDICIAL DISTRICT COURT**
VS. NO. 86273-D	**PARISH OF IBERIA**
DIAMOND OFFSHORE CO.	**STATE OF LOUISIANA**

For the Plaintiff: Lawrence D. Wiedemann,
New Orleans, LA

For the Defendant: Cameron B. Simmons,
Jeanerette, LA
Christopher B. Siegrist,
Houma, LA

REASONS FOR JUDGMENT

(Filed March 29, 2001)

This suit was heard in Iberia Parish on November 14 and 15, 2000. The case was taken under advisement with a deposition of Jerry McHenry still to be taken as well as post-trial memorandums to be submitted by all parties. All matters have been submitted to the Court, with the exception of attorney's fees, and the case is now in posture for decision.

FACTS:

Sadat Muhammad (Sadat) worked as a roustabout for Diamond Offshore (Diamond) from October 11, 1996 until March 8, 1997. Prior to starting work for Diamond, Sadat underwent a comprehensive pre-employment physical and was cleared for employment in a heavy labor capacity. On March 8, 1997, Sadat sustained injury when he fell on an external stairway leading from the pipe deck to the air

conditioning (A/C) deck while he was carrying a long handled cleaning brush in one hand and a bucket of cleaning fluid in the other. There are handrails situated at the top of the stairway and along the stairway. There is also a four-inch deck coaming marked with black and yellow striping, used for pollution control, in the area by the stairwell. Sadat was found by another worker, Timothy Taylor, at the bottom of the stairwell on the A/C deck. After a brief accident report was filled out with the safety technician, Jerry McHenry, Sadat was taken off the vessel by helicopter to Terrebonne General Hospital in a neck brace and on a back board. He was treated and released whereupon Sadat was picked up by his wife. Sadat complained of various injuries over the 22 day period following the accident, namely dizziness, left shoulder pain, low back pain, and headaches.

Sadat had several follow-up visits for his injuries. He was seen by Dr. John Watermeier on March 19, 1997, complaining of moderate to severe low back and neck pain, headaches, and numbness in both feet. In April 1997, less than one month following the accident, Dr. Watermeier made a diagnosis of post-traumatic disc disease in the cervical and lumbar spine.

On March 17, 1999, Dr. Kenneth Adatto performed an anterior cervical discectomy and fusion at C5-6. He was also seen by Dr. Christopher Cenac, at the request of Diamond, in March of 1997 and in October of 1997. Dr. Cenac, based on his findings and those of Dr. Michael Molleston released the plaintiff to full duty; however, the plaintiff never returned to work. This suit followed.

This is a Jones Act case where general maritime law will be used. The plaintiffs allege negligence on the part of

Diamond as well as assert a claim of unseaworthiness of the vessel, *Ocean Lexington*.

The plaintiff, Sadat, testified that he did not know exactly how he tripped and fell down the stairwell. He stated that he was carrying a long-handled brush in one hand and a bucket with cleaning fluid in the other hand. He also stated that he was unable to use the handrail at the top of the stairwell. He did testify that he knew he was supposed to have one hand on the handrail. He stated that he stepped over the four-inch deck coaming with his front foot then somehow tripped when he proceeded with his next foot as he approached the first step. It was apparent from his testimony that he was uncertain as to what exactly caused his fall. He stated it may have been his second foot that got caught in the coaming, or the brush which was dangling at his side that may have got caught in the coaming. In his deposition, which was admitted into evidence, he stated that the brush got caught in the coaming. He further testified that he fell down the stairs and the bucket and handle of the brush ended up with him at the bottom, while the actual brush remained at the top of the stairwell. Sadat also gave extensive testimony about his injuries and his capacity to perform certain daily tasks. He also testified that he had a previous back injury for which he was treated at Charity Hospital. He also testified that he had a car accident in January of 1998, and that he had leg pain after that incident.

The plaintiff's wife, Mrs. Muhammad, testified about what she has observed regarding her husband's injuries. Since his accident, she stated that Sadat has had much difficulty with his neck and back. She said that he is unable to play sports and unable to have a physical relationship with her. She also said that Sadat was unable to

do any heavy lifting including picking his children up off the ground.

Mr. Timothy Taylor, who was also a roustabout on the *Ocean Lexington*, testified as to his perceptions of the accident since he came upon the scene as Sadat was falling down the stairs. He also testified about the procedure he and Sadat were supposed to follow as roustabouts in carrying the bucket and brush as well as walking down a stairwell. Mr. Taylor stated that they were told several times at safety meetings that they were supposed to put the brush inside the bucket and put it in one hand, while the other is to be kept free to utilize the handrail as they go down a stairwell. There was a safety meeting the morning of the accident where proper procedure was discussed. Mr. Taylor also testified that Diamond's safety procedures call for one hand to be on the handrail at all times when using a stairwell. Mr. Taylor did not see what caused the accident, however, he testified that he saw Sadat, the bucket, and the handle of the brush at the bottom of the stairwell on the A/C deck. Mr. Taylor testified that he has used the stairwell several times and has performed the task of cleaning the A/C deck. He stated that the proper procedure was to carry the bucket and brush in one hand while leaving the other hand free to use the handrail while descending the stairwell. He also testified that the handrail is accessible when you approach the steps.

Dr. John Watermeier testified by deposition. He stated that he saw Sadat eleven days after the accident and diagnosed him with a cervical and lumbar disk syndrome after performing several tests including an MRI. He testified that surgery was the only way to cure the problem. He also stated that the fall on the *Ocean Lexington*

was the cause of the injuries to Sadat. (Watermeier dep. Pgs 16, 17.)

Dr. Kenneth Adatto also testified by deposition. Dr. Adatto testified to similar findings as Dr. Watermeier. He performed an anterior cervical discectomy and fusion at C5-6 on Sadat on March 17, 1999, and has scheduled an anterior lumbar discectomy and fusion at L5-S1. He also testified that the injuries were more likely than not a result of the fall.

Dr. Michael Molleston testified, by deposition, that he saw Sadat only once. He testified that he thought some of Sadat's injuries were "emotional" and he did not relate the plaintiff's headaches to his neck pain. He did not treat Sadat, but scheduled a follow-up appointment for further tests. Sadat did not attend this appointment.

Dr. Christopher Cenac testified at trial that he saw Sadat at the request of Diamond on March 20, 1997 and October 29, 1997. Dr. Cenac testified that there was nothing wrong with his neck, but noted complaints of numbness with his neck, right foot pain, pain in his back, and headaches. He thought that the headaches were non-cervical in nature and not related to the fall on the *Ocean Lexington*. Dr. Cenac saw him again in October, and after reviewing the reports of Dr. Molleston and evaluating the patient himself, found that Sadat was ready to return to work at full capacity. Dr. Cenac also testified that there was no difference in the appearance of the lumbar in the plaintiff's pre-employment MRI and post-injury MRI. He also did not find any signs of nerve root impingement or entrapment.

Dr. Thompson Dietz, a board certified radiologist, testified that he could find no nerve root impingement and

also stated, as Dr. Cenac did, that there was no difference in the lumbar in the pre and post MRI's.

LAW AND ANALYSIS:

Jones Act Negligence: Relying on *Vendetto v. Sonat Offshore Drilling Co.*, 725 So.2d 474 (La. 1999) and *Gautreaux v. Scurlock*, 107 F.3d 331 (5th Cir. 1997), the court must apply the standard of proof outlined in both cases. In overruling *Spinks v. Chevron*, 507 F.2d 216 (5th Cir. 1975), the court in *Gautreaux* held that a Jones Act seaman is required to act as a reasonable seaman under like circumstances, and a Jones Act employer is required to act as a reasonable employer under like circumstances. Although not bound by the 5th Circuit decision, the Supreme Court and the 3rd Circuit have applied this standard, therefore, we must do the same. The so-called slight negligence standard is not appropriate in Jones Act cases as a result.

A seaman, then, is obligated under the Jones Act to act with ordinary prudence under the circumstances, *Gautreaux, supra*. The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe workplace but also his own experience, training, or education. The reasonable person standard, therefore, under a Jones Act negligence action becomes one of the reasonable seaman in like circumstances.

In *Vendetto, supra*, the plaintiff was undertaking a common, ordinary task which he had done many times before, and he chose the method by which to lower the tools, which weighed no more than forty pounds. There was no testimony that the method he chose to use was unsafe, merely that there were other methods which he

could have used. The Supreme Court held that the employer could not be held liable by applying the standard set out in *Gautreaux*. The employer was held to a standard as that of an employer in like circumstances, and since the plaintiff could not prove that the employer breached any duty to the employee, the negligence claim failed.

It is clear that there was a policy and an instruction to the roustabouts that they should follow certain safety procedures when attempting to descend the stairwell from the pipe deck to the A/C deck in order to perform the cleaning duties. It is clear from the testimony of Sadat, Timothy Taylor, and Jerry McHenry that a seaman in like circumstances would not have attempted to descend a staircase with a five gallon bucket filled with soap in one hand and a long-handled brush in the other. (McHenry dep. Pgs. 25-31.) The policy was for the brush to be put inside the bucket so that the other hand could be free to use the handrail. Diamond cannot be held liable to a seaman who did not act with ordinary care while performing his cleaning duties.

In *Vendetto*, the Court found that the employer was not liable merely for the failure to instruct; however, in this case, we do have a specific policy and instruction. Sadat testified that he knew he was supposed to have one hand on the railing. Timothy Taylor testifies that the crew was instructed at the safety meetings about the proper way to perform this task. There was to be one hand free to utilize the handrail while stepping over the coaming and descending the stairwell.

Absent a showing that the method taught was unsafe, namely using one hand on the handrail to step over the coaming and proceed down the stairwell, there can be no

finding against the Jones Act employer on a negligence claim, *Vendetto, supra*. Clearly from all the testimony at trial, there was no proof that the method taught was unsafe. The plaintiff failed to exercise the care a reasonable seaman would in like circumstances. He did not follow the policy nor did he use the method that was taught to him.

Accordingly, the Court finds that the plaintiff was 100% at fault as he did not act as a reasonable seaman in like circumstances, and that the employer did not breach any duty owed to the plaintiff. Additionally, the Court finds that Diamond acted as a reasonable employer in like circumstances. The Jones Act negligence claim fails.

UNSEAWORTHINESS

The Court in *Foster v. Destin Trading Corp*, No. 96-0803 (La. 5-30-97); 700 So.2d 199, stated that an owner of a vessel is responsible to the captain or any seaman thereof for injuries received because of the unseaworthiness of the vessel and that there is an implied obligation that all reasonable means shall be employed to insure the seaworthiness of the vessel. To prevail on an unseaworthiness claim a seaman must prove that the unseaworthy condition was the proximate cause of his injury, *Youn v. Maritime Overseas Corp*, 605 So.2d 187, (La.App. 5th Cir 1992.) Although the duty of seaworthiness is absolute and does not require negligence, the mere fact an accident occurred does not establish unseaworthiness, *Vendetto, supra*. The plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing plaintiff's injury and that injury was

either a direct result or a reasonably probable consequence of the unseaworthiness.

The plaintiff did not carry his burden in proving by a preponderance of the evidence the coaming was the proximate cause of his accident. Using the standard in *Vendetto*, the plaintiff, by his own testimony could not establish how he tripped. He testified that it may have been the coaming or it may have been the brush. This testimony, along with all other evidence, does not meet the threshold evidentiary standard to prove unseaworthiness under *Vendetto*. It is more likely than not that something other than the placement of the coaming caused the accident.

Although Dr. Gary Nelson, a safety engineer, testified by deposition as to the safety of the stairwell and spoke of OSHA regulations, the *Ocean Lexington* is not under OSHA guidelines. *Watterson v. Mallard Bay Drilling*, 649 So.2d 431 (La.App Cir 3 10-12-94.)

Accordingly, this Court finds that the plaintiff did not prove by a preponderance of the evidence that the unseaworthy condition of the vessel was the proximate cause of his injuries. The unseaworthiness claim fails.

MAINTENANCE AND CURE:

The duty to provide maintenance and cure arises from the seaman's employment contract and comprises most illnesses or injuries which occur during the existence of the employment arrangement. The shipowner's obligation to provide maintenance and cure ends when the seaman reaches maximum medical cure. Maximum medical cure is reached when the seaman's injuries are determined by the

seaman's treating physician to be of a permanent nature. An injured plaintiff is not required to choose the best method of treatment, or select the most skilled and competent physician, and cannot be faulted for accepting a course of treatment offered by his orthopedic surgeon as a means of reducing his pain. *Use v. Use*, 654 So.2d 1355 (La.App 1st Cir. 1995.)

This Court finds that maintenance and cure was improperly withheld. Dr. Cenac's testimony does not persuade the court on the extent of the plaintiff's injuries. It is the trial court's discretion to determine the weight and credibility it gives to the testimony offered at trial. There is ample medical evidence that establishes that the plaintiff had not reached maximum medical recovery at the time the defendant stopped maintenance and cure payments on November 8, 1997. The depositions of Dr. Watermeier and Dr. Adatto provide the evidence of the plaintiff's injuries and the treatment that was rendered to cure these injuries. Both doctors attribute the fall on the *Ocean Lexington* to the back injuries suffered by the plaintiff. Both thought surgery was necessary to resolve the problems resulting from the injuries. There is a difference of opinion among the doctors regarding the lumbar surgery proposed by Dr. Adatto. Dr. Cenac feels that any nerve root impingement was not caused by the accident, and in fact his pre-employment MRI was the same as his post-injury MRI.

The test for determining causal relationship between accident and subsequent injury is whether the plaintiff provided through medical testimony that it is more probable than not that subsequent injuries were caused by the accident. *Mart v. Hill*, 505 So.2d 1120 (La. 1987.) The claimant's disability is presumed to have resulted from an

accident, if before the accident the injured person was in good health, but commencing with the accident if the symptoms of the disabling condition appear and continuously manifest themselves afterwards, providing the medical evidence shows there to be a reasonable connection between the accident and the disabling condition. *Johnson v. Manuel*, 670 So.2d 273 (La.App 3rd Cir. 1996.) In order to defeat this presumption, the defendant must show some other particular incident that could have caused the injury in question.

The plaintiff underwent a full medical examination as part of his pre-employment physical by Dr. Howard Nelson. He was cleared to perform heavy duty after the testing was reviewed. He had no cervical or lumbar complaints or problems. The defendant has not proven by a preponderance of the evidence that another event caused the injuries claimed by the plaintiff. The plaintiff proved by a preponderance of the evidence that the injury to the C5-6 level of his back was caused by the accident on the *Ocean Lexington*. The testimony of both Dr. Adatto and Dr. Watermeier, by deposition, provides the proof necessary to meet the threshold burden provided in *Mart*. The injuries that led Dr. Adatto to perform the fusion were, according to him, a direct result of the fall, (Adatto dep. Pg 36.) There is more of a difference of opinion regarding the future fusion in the lumbar region; however, the plaintiff carried his burden in that it is more probable than not that the injuries in the lumbar region were caused by the accident. Again, Dr. Cenac's view of the plaintiff's injuries do not persuade the Court. Evidence is again found in the deposition testimony of Dr. Adatto and Dr. Watermeier. Dr. Watermeier states that Sadat was asymptomatic before the accident, but continually symptomatic after the

accident; therefore, lumbar surgery was a reasonable solution to the lumbar problem. (Watermeier dep. Pgs. 14, 15.) Dr. Adatto also referred his decision for further approval to Dr. Adinolfi who gave the approval for surgery to the lumbar area.

Maintenance costs are due until the plaintiff reaches maximum medical recovery. *Jordan v. Intercontinental Bulktank Corp*, 621 So.2d 1141 (La.App 1st Cir 2/19/93.)

The plaintiff was being paid a rate of $15 a day when the payments stopped on November 8, 1997. This Court finds that the plaintiff had not reached maximum medical recovery at that point, and still has not because of the future surgery needed in the lumbar area of the plaintiff; and awards the plaintiff maintenance at a rate of $15 a day from November 8, 1997 until he reaches maximum medical recovery.

This Court finds that the defendant improperly withheld maintenance and cure when it stopped payments in November of 1997. This was egregious conduct and the Court is persuaded by the deposition testimony of Dr. Adatto regarding the extent of the plaintiff's injuries. Therefore, the plaintiff is awarded his past and future medical costs for his injuries as part of the cure obligation owed by the defendant.

This Court calculates the following to be awarded to Sadat Muhammad:

Past Medical Cost: $ 59,599.53

Future Medical Cost: $ 46,309.00

Maintenance at the rate of $15 per day from November 8, 1997.

The defendant, Diamond Offshore Company, is cast for all court costs. Pre-judgment interest is awarded, at the discretion of the Court.

ATTORNEY'S FEES:

Because the Court has found that maintenance and cure were wrongfully terminated, the plaintiff should be awarded attorney's fees. Consistent with the agreement of counsel during the trial, **the attorney for the plaintiff will move for a hearing** on the amount of attorney's fees to be awarded, and the Court will hear evidence on that issue at that time.

Let a formal judgment consistent with these Reasons for Judgment be prepared by the attorney for the plaintiff, submitted to the attorneys for Diamond for approval as to form, then presented to the Court for signature.

Officially in Chambers, New Iberia, Iberia Parish, Louisiana. March 28, 2001.

APPENDIX D

16TH JUDICIAL DISTRICT COURT
FOR THE PARISH OF IBERIA

STATE OF LOUISIANA

NO. 86-273 DIVISION "D" DOCKET NO.

SADAT MUHAMMAD

VERSUS

DIAMOND OFFSHORE COMPANY

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

(Filed May 16, 2001)

This cause was tried before the Honorable William D. Hunter on November 14 and 15, 2000, and taken under advisement to be held open for the submission of additional depositions and post-trial memoranda. After submission to the Court, the Court finds for the written reasons assigned on the 28th day of March, 2001, in favor of Diamond Offshore Company, dismissing with prejudice any and all claims by plaintiff against Diamond Offshore Company herein, except as follows:

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment herein in favor of plaintiff, Sadat Muhammad, and against defendant, Diamond Offshore Company, for past medical costs for his injuries as part of the cure obligation owed by the defendant in the sum of Fifty-Nine Thousand Five Hundred Ninety-Nine and 53/100 ($59,599.33) Dollars with pre-judgment judicial interest from March 8, 1997, until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment granted herein in favor of Sadat Muhammad and against Diamond Offshore Company for the future medical costs for his injuries as part of the cure obligation owed by the defendant in the amount of Forty-Six Thousand Three Hundred Nine and No/100 ($46,309.00) Dollars with pre-judgment judicial interest from March 8, 1997, until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that maintenance at the rate of $20.00 a day be paid Sadat Muhammad from November 8, 1997, until Sadat Muhammad reaches maximum medical recovery with judicial interest on the past due amount from November 8, 1997, until paid;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that maintenance and cure was wrongfully terminated and that Sadat Muhammad be awarded attorney's fees in an amount to be determined after hearing on motion of plaintiff.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Diamond Offshore Company is liable for costs of court.

JUDGMENT READ, RENDERED AND SIGNED, in Chambers in New Iberia, Iberia Parish, Louisiana, this 14 day of May, 2001.

/s/ William D. Hunter
WILLIAM D. HUNTER,
JUDGE